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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 981

JAMES O. McCUE, JR., AND JAMES O. McCUE, SR.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 5a–17a) has not yet been reported. One opinion of the district court (P.A. 115a–134a)[1] is reported at 178 F. Supp. 426; a second opinion of the district court (P.A. 148a–151a) is unreported.

JURISDICTION

The judgments of the court of appeals were entered on March 20, 1962 (Pet. 1a–4a), and a timely petition

[1] In this brief in opposition, as in the petition for a writ of certiorari, petitioners' appendix in the court below ("Appellants' Appendix") is designated "P.A.," and the government's ("Appellee's Appendix") is designated "G.A."

for rehearing was denied on April 20, 1962. The petition for a writ of certiorari was filed on May 18, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the bringing of this prosecution for making false oral statements in 1954 to Treasury agents investigating petitioners' income tax liability violated fair standards of federal criminal justice in view of the prior disposition of indictments charging petitioners with attempts in 1951 and 1952 to evade and defeat their income taxes.

2. Whether petitioners' conduct in making false oral statements to Treasury agents in a matter within the jurisdiction of the Internal Revenue Service constitutes a violation of 18 U.S.C. 1001.

3. Whether the government's failure to have certain grand jury testimony recorded by a stenographer constituted reversible error.

4. Whether the question asked of petitioner McCue, Sr., in answer to which he made a false statement, was too vague and ambiguous to support a conviction.

STATUTE INVOLVED

Section 1001 of the Criminal Code (18 U.S.C. 1001) provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or repre-

sentations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

On February 2, 1959, the petitioners were indicted in the United States District Court for the District of Connecticut, each on three counts, for having knowingly and wilfully made false statements and representations to special agents of the Internal Revenue Service in August 1954, in a matter within the jurisdiction of the Treasury Department, Internal Revenue Service, in violation of 18 U.S.C. 1001 (P.A. 3a, 6a–8a, 418a–420a). After a seven-week trial before a jury, petitioner McCue, Jr., was convicted in May 1960 on two counts (P.A. 374a–375a) and was fined $5,000 on each count and sentenced to concurrent one-year prison terms, execution of which was to be suspended after service of four months and petitioner to be placed on probation for one year from that date (P.A. 409a). After an eleven-day trial before another jury, petitioner McCue, Sr., was convicted in October 1960 on one count (P.A. 547a) and was fined $5,000 and sentenced to serve a one-year prison term, with the same provision for suspension after four months and one year's probation running from that date (P.A. 551a–552a).

A. EVENTS LEADING UP TO THE PRESENT PROSECUTION

In the latter part of 1954, a Treasury special agent was conducting an investigation of the income tax returns of petitioners for the years 1946–1952 and

those of the Stamford Rolling Mills Company (a corporation) for the fiscal years ended August 31, 1947, through August 31, 1951 (G.A. 52–53, 435). Petitioner McCue, Sr., was President and Treasurer of the corporation; petitioner McCue, Jr., was Vice-President; and the entire stock of the corporation was held by the McCue family and in family trusts (G.A. 89, 153). Petitioners made the false statements involved in this prosecution at separate conferences in August 1954 in response to questions put to them by the agent (see pp. 5–10, *infra*).[2] Some ten months later the agent submitted his report, recommending that both petitioners be prosecuted for the wilful attempted evasion of income taxes (P.A. 178a, 451a–452a; G.A. 53, 439). The agent did not recommend prosecution for the making of false oral statements in 1954 (G.A. 66, 448, 451, 558).

In May 1956 the Department of Justice directed the then United States Attorney to institute criminal proceedings against both petitioners for the wilful attempted evasion of their personal income taxes for the years 1950 and 1951, in violation of Section 145(b) of the Internal Revenue Code of 1939, a felony provision (P.A. 20a). The then United States Attorney requested authorization to prosecute petitioners instead under Section 145(a) of the Code, a misdemeanor provision, but such authorization was

[2] Collaborating in the investigation, of which the special agent was in charge, was an Internal Revenue agent, who handled the "audit" or civil tax aspects of the case and who was present at the conferences in August 1954 (G.A. 53, 418, 637).

denied (P.A. 19a, 21a). In March 1957, a grand jury indicted petitioners for a violation of Section 145(b) (P.A. 14a–18a). On April 15, 1957, the then United States Attorney, appearing in court with petitioners and their counsel, moved the court to allow McCue, Sr., to plead to a misdemeanor charge under Section 145(a) and to dismiss the charge against McCue, Jr. (P.A. 558a, 566a). McCue, Sr., pleaded *nolo contendere*, and the court found him guilty as to two counts, adjudging concurrent sentences of a $10,000 fine, a suspended prison term of one year and two years' probation; the court also dismissed the indictment against McCue, Jr. (P.A. 564a–566a).[3]

B. EVIDENCE OF PETITIONER MCCUE, JR.'S GUILT

Petitioner McCue, Jr., made the false oral statements to a Treasury special agent at a conference held on August 31, 1954 (G.A. 55, 418–429). McCue, Jr., came to the meeting voluntarily, was accompanied by his attorney, was advised of his constitutional rights and stated that he understood them (G.A. 418). He gave testimony under oath (*ibid.*). The counts as to which he was found guilty (Counts I and III) related to false travel vouchers and to water wells drilled on

[3] One week later, the then United States Attorney appeared before the court accompanied by an attorney from the Department of Justice and moved that the judgment convicting McCue, Sr., of violating Section 145(a) be vacated on the ground that, since a violation of that section was not a lesser included offense under Section 145(b), the court had been without jurisdiction to render the judgment. This motion was denied. *United States* v. *McCue*, 160 F. Supp. 595 (D. Conn.).

his personal estate. The evidence of his guilt may be summarized briefly as follows:

1. During the period August 1947–1951, monthly travel vouchers were submitted to the corporation on behalf of petitioner McCue, Jr., averaging $1,774.00 per month over the four-year period (G.A. 372–395). The voucher was usually prepared at the end of each month by McCue, Jr., and given to the corporation's paymaster, who would prepare the "reimbursement" check, cash it at the bank and turn the cash over to McCue, Jr. (G.A. 92, 97–98, 100, 113–114, 133–143). No substantiating documents were ever presented to support McCue, Jr.'s claim for payment (G.A. 104). All of these amounts were treated as deductible expenses by the corporation (G.A. 102). At the August 31, 1954, conference, the Treasury special agent asked McCue, Jr., "Were you at all times at the places shown on the dates shown on these memos?";* petitioner McCue, Jr., answered under oath, "Yes. To the best of my knowledge we were; yes" (G.A. 427). This answer, which was the basis for Count I, was false. As the court below described the government's evidence on this point (Pet. 9a):

> The Government was able to show from corporate records, including the gatemen's books, cafeteria slips and telephone toll slips and from the records of the McCues' country club that they were in fact at the plant or nearby on the dates on which, according to the travel vouchers, they purported to be in other cities.

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* It is clear from the context that "memos" referred to the travel vouchers.

Indeed, defense counsel conceded in his summation to the jury that the McCues were usually not at the places on the dates shown in the travel vouchers (G.A. 305, 317–318; 320–321).

2. At the August 31, 1954, conference, the Treasury special agent asked petitioner McCue, Jr., about some water well drilling services that had been performed on his personal estate but which had been paid for by the corporation and treated by it for tax purposes as deductible expenses. The following questions were asked by the agent and answered by McCue, Jr., under oath (G.A. 423):

> Q. Who negotiated to have this well drilled at your place?
>
> A. I haven't any idea, not even to this day.
>
> Q. Who paid for the well drilling operation?
>
> A. I don't know.
>
> Q. Did you?
>
> A. No, sir. I didn't need it. I didn't want it. I didn't authorize it, and knew nothing about it.

As the court below found, the falsity of these statements, which were the basis for Count III, was "amply established" by the evidence (Pet. 9a):

> McCue, Jr. ordered the well drilled, examined, discussed and accepted the proposal provided by the firm engaged for the work, and ordered them to undertake it. He was kept informed of the work on the well as it proceeded and discussed its progress with drillers. He went with them to choose a spot on his property for drilling the well. As with his father the location of the well drilling equipment, its size and

the noise of the operation make it impossible that he was unaware that a well was being drilled on his property.

The record fully supports this capsule summary by the court of appeals (P.A. 183a–187a, 271a–273a, 278a–279a; G.A. 72–77, 82–84, 147–151, 184–191, 397, 399–415, 417).

C. EVIDENCE OF PETITIONER MCCUE, SR.'S GUILT

Petitioner McCue, Sr., made the false oral statement to a Treasury special agent at a conference held on August 13, 1954 (G.A. 637–653). McCue, Sr., through his attorney, had volunteered to appear before the agents to testify, and this offer was accepted (G.A. 451). He was accompanied by his attorneys, was advised of his constitutional rights and stated that he understood them (G.A. 637–638). He gave testimony under oath (G.A. 638). The count as to which he was found guilty (Count III) related to water wells drilled and reconditioned on his personal estate. The evidence of his guilt may be summarized briefly as follows:

At the August 13, 1954, conference, the Treasury special agent asked McCue, Sr., about some water well drilling and reconditioning services that had been performed on his personal estate. As in the case of his son, the services had been paid for by the corporation, which charged the payments to "Repair Expenses" and took them as deductions on its income tax return. The following questions were asked by

the agent and answered by McCue, Sr., under oath (G.A. 648):

> Q. Who negotiated to have the work done?
> A. Jack McCue [McCue, Sr.'s brother].
> Q. Was he told to have it done?
> A. No, he done a lot of things or all things. He was at my home with people, with customers, at meetings. I presume he did.
> Q. You didn't have a thing to do with it?
> A. Not a thing.

These answers, the last one of which served as a basis for Count III, were false. The court of appeals summarized the evidence establishing their falsity as follows (Pet. 8a):

> * * * McCue, Sr. had in fact on several occasions discussed his need for more water with Downey, the purchasing agent of the Company, and sometime late in 1950 or early in 1951, in his own office and in the presence of McCue, Jr. had instructed Downey to have wells drilled on his property and on the property occupied as a home by McCue, Jr. Downey engaged the services of a company in the business of drilling wells and the two wells were drilled. Downey discussed with McCue, Sr. certain difficulties which were encountered in the course of drilling the wells. The well on the property of McCue, Sr. was about three hundred feet from his house and the derrick used in drilling it was about forty or fifty feet high. The drilling equipment makes a noise like a pile driver.
>
> * * * * *
>
> Jack McCue had nothing whatever to do with the well drilling or the negotiations, and the

men in charge of the drilling had never even heard of him.

The court's summary is fully supported by the record (P.A. 452a–453a, 455a, 456a–460a; G.A. 455–459, 463, 465, 467–470, 480–481, 486–487, 490–492, 506–507, 510–513, 517, 518, 525, 562–563, 636, 655–667).

ARGUMENT

1. Petitioners claim here, as they urged in the court below, that in "repudiating" an alleged agreement not to prosecute the present charges, the government violated "minimal standards of honor and fair dealing in Government prosecutorial practices" (Pet. 9) that should be enforced by this Court (Pet. 8–14). They do not make any legal argument to the effect that petitioner McCue, Sr.'s plea to the earlier charge (see p. 5, *supra*) was "falsely induced" so as to invalidate that conviction, but rather urge intervention by this Court as a matter of its discretion "to exercise its supervisory power over the administration of federal criminal justice" (Pet. 9). The short answer to this request is that the record does not support the existence of an agreement not to press the instant charges. Furthermore, we respectfully urge that as a general rule—and certainly in the circumstances disclosed by this case—the enforcement of informal agreements between counsel is not a proper function of this Court.[5]

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[5] Petitioners appear to have abandoned their contentions, pressed vigorously in the court of appeals, that the instant prosecutions are barred on the theory of estoppel and because their subject matter was part of a binding statutory compromise entered into between defense counsel and the former

(a) As the citations advanced in support of it readily disclose, petitioners' statement (Pet. 8) that "[*t*]*he United States Attorney promised that,* if McCue, Sr. would plead *nolo contendere* to misdemeanor charges, the indictment against McCue, Jr. would be dismissed and *the charge that defendants made false statements to Special Agents of the Internal Revenue Service would not be prosecuted*" (emphasis supplied) is without the slightest foundation.[6] On the contrary, those references show that the possibility of the petitioners' being charged with having made false statements to the government was never even considered in the discussions leading up to the alleged agreement. The only charges that were discussed were the tax evasion charge under Section 145(b) of the 1939 Code and its possible reduction to a misdemeanor charge under Section 145(a) or Section 3616(a) of the 1939 Code for the filing of false returns (P.A. 31a–32a, 39a); there was no discussion of a possible charge for making

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United States Attorney. In any event the trial court, in a lengthy opinion, pointed out many reasons why those points are without merit (P.A. 115a–134a), and the court of appeals agreed (Pet. 14a–17a).

[6] After correctly observing that "the exact confines of the agreement were never clearly defined" (Pet. 14a), the court below stated that "it may be assumed, *for our purposes*, that both the United States Attorney and counsel for defendants understood that the offenses which are the subject of the present prosecution were to be included in the agreed upon disposition of the matter" (emphasis supplied; *ibid.*). This assumption *arguendo* is not a finding that the agreement so provided, for the court plainly meant that in view of the grounds on which it disposed of this issue, it did not matter whether or not the agreement so provided.

false statements to a Treasury special agent in violation of 18 U.S.C. 1001 (*ibid.*; see also G.A. 14–15). No such charge was then pending (P.A. 95a); neither had the investigating agent recommended the prosecution of such a charge (G.A. 66), nor had the Department of Justice been requested to authorize such a charge (P.A. 91a). The then United States Attorney who had made the alleged agreement with petitioners had never given "any thought" (P.A. 99a) to the possibility of bringing a charge under 18 U.S.C. 1001; "all [he] had in mind" in making the agreement was "the disposal of the indictments" then pending (P.A. 91a), and he had not intended, nor did he consider himself authorized, to bind the government "for any charges not then pending" (P.A. 100a).[7]

In short, to the extent that any agreement not to prosecute under 18 U.S.C. 1001 ever existed, it existed only in the minds of petitioners' trial counsel—who, for all the record shows, had not themselves entertained any thought of a possible prosecution for the making of false statements to the government, but who would presumably have been quite receptive to the notion of blanket immunity for their clients from prosecution on any conceivable charges. It borders, we suggest, on an affront to the responsibility of the

[7] The United States Attorney did state that, in making the agreement, he "never intended to bring any other charges" (P.A. 99a); however, he testified that he had never disclosed that intention to petitioners' attorneys (*ibid.*). Moreover, as we have noted, that intention was arrived at without due consideration having been given to the possibility that petitioners should be prosecuted under 18 U.S.C. 1001.

then United States Attorney to allege that he would make a wholesale agreement not to prosecute petitioners on charges which neither he nor they (so far as the record shows) had ever considered. Such an agreement would be so plainly contrary to public policy as not only to be unworthy of enforcement but as to raise serious questions as to the good faith of the parties entering into it.

Nor is it reasonable to suppose that even the broadest sort of agreement not to prosecute further any matters arising out of the filing of petitioners' tax returns would embrace the prosecution of charges under 18 U.S.C. 1001. That statute is wholly distinct from the tax statutes and serves an entirely different governmental purpose. While the criminal tax laws, such as Sections 145(a), 145(b) and 3616(a) of the 1939 Code, *supra*, are designed to protect the federal revenue, 18 U.S.C. 1001 is designed to enforce every citizen's obligation to deal truthfully with his government in all matters within its proper jurisdiction. So diverse are these two classes of enactments that an agreement to refrain from prosecuting under one of them could not properly be considered as embracing the other where such a broad purpose had not been spelled out with the most unequivocal specificity. Especially is this so where, as here, the prosecutions under the two sets of statutes involve wholly separate transactions. The 1957 prosecution under Section 145 of the Internal Revenue Code of 1939 was for attempts, carried out in 1951 and 1952, to evade and defeat income taxes for the years 1950 and 1951 by filing false and fraudulent income tax returns (P.A.

14a–17a); the 1959 prosecution under 18 U.S.C. 1001 was for making false oral statements under oath in 1954 to a duly authorized representative of the government acting in a matter within the jurisdiction of his agency. Plainly enough, the fact that the latter offense occurred in the course of the investigation of the former does not create the identity between the two upon which petitioners base their argument.

(b) Petitioners' efforts retrospectively to transform what was at most a simple agreement not to press any pending tax evasion charges into a wholesale abdication of the prosecutor's responsibilities suggests what is perhaps the most compelling reason for the Court's not entertaining this issue; namely, that such agreements are not ordinarily susceptible of effective judicial enforcement. Agreements between counsel for the parties to a law suit, whether in a civil proceeding or between prosecution and defense, are normally informal. They are not usually reduced to writing or made a matter of record; indeed, as was the case here (G.A. 12–13), the court is often not even informed of the existence of an agreement, let alone of its terms, for the parties to such an agreement do not contemplate that it will ever be judicially enforced or in any way be binding on any court. As the trial court discovered in unsuccessfully attempting to make an accurate reconstruction of this agreement, the parties' recollections of such informal transactions soon fade and, consciously or unconsciously, often tend to reflect what they later wish the agreement had provided (see, *e.g.*, G.A. 34–35). Such vague and often biased retrospect provides no proper

basis for judicial action. The execution of most such agreements must very largely depend, as it has always depended, upon the parties' contemporary understanding and knowledge of its terms and purposes and upon the confidence of each in the good faith of the other.

Moreover, there are many considerations bearing upon whether, or the extent to which, an informal agreement between counsel should be given effect that can be adequately appreciated and acted upon only by the parties themselves. There may, for example, be a critical change in the circumstances to which the agreement relates. Or one or the other of the parties may have failed to make a full disclosure of the relevant facts. By the same token, it would seem that the fact that, in this case, the then United States Attorney acted not only without the authority of the Department of Justice in making the alleged agreement but directly contrary to its instructions (see pp. 4–5, *supra*) would have some relevance in determining how generously the alleged agreement ought to be construed and in what way any doubts should be resolved. Each of these considerations must be weighed by each party in relation to the terms and purposes of the agreement in question and to his own professional and personal conscience. None of them can be properly evaluated in its full context by a court far removed from the circumstances that gave rise to the agreement.

2. Petitioners also argue (Pet. 13–14) that their indictment for tax exasion and their subsequent indictment on the present false statement charges consti-

tuted "multiple prosecutions" such as to raise "serious questions for the administration of federal criminal justice." Petitioners do not argue, nor could they argue, that there was any legal bar to the present prosecution; no question, for example, of double jeopardy is involved. What they do contend is that the general policy of the Attorney General, enunciated in the government's Motion to Vacate the Judgment and Dismiss the Indictment (p. 3) in *Petite* v. *United States*, 361 U.S. 529, 530, that "several offenses arising out of a single transaction * * * should not be made the basis of multiple prosecutions" ought to be enforced—indeed, judicially enforced—in this case.

We note at the outset that the two prosecutions involved here—one based on the filing of fraudulent tax returns in 1951 and 1952, the other based on false oral statements made in 1954—in no sense arose "out of a single transaction" (see pp. 13–14, *supra*). More importantly, however, the enforcement of such policies as this, as well as the ultimate exercise of that broad power of judgment known as the "prosecutor's discretion," have always been thought properly to reside in the Attorney General. Petitioners have suggested no sound reason for transferring that administrative function to this or any other court. Nor does the manner in which executive discretion was exercised in this case suggest any occasion for judicial concern. The prosecution of petitioners and the arguments made on appeal in support of these convictions were authorized, reviewed and re-reviewed at the highest levels of the Department of Justice. While the fraud attempted to be perpetrated upon the government by

petitioners' false oral statements plainly called for vigorous prosecution, the fact that petitioners had previously been prosecuted for tax evasion on not wholly unrelated facts was, of course, a matter to be taken into account. But no less relevant was the consideration that one petitioner (McCue, Sr.) had at that time been convicted of only a misdemeanor and the other had gotten off scot free—both in circumstances where the Department's otherwise invariable policy has been to press for a felony conviction (see G.A. 25–26; Balter, *Fraud Under Federal Tax Law* (2d ed.), p. 140). The executive determination was neither lightly nor carelessly made, nor, we submit, was it inequitable. We suggest that, on the contrary, a failure to prosecute might well have been viewed as a gross discrimination in favor of the wealthy and influential.

3. Petitioners contend (Pet. 15–25) that Section 1001 of the Criminal Code does not apply to the false statements they made to the Treasury special agent because (a) in their view, the false statements did not pervert the functioning of government offices, (b) the statements were made in response to questions put by a criminal investigator, and (c) the statements were oral. None of these arguments has merit.[8]

[8] Petitioners' argument as to the severity of the punishment permissible under 18 U.S.C. 1001 (Pet. 17) was answered by this Court 20 years ago when it stated (*United States* v. *Gilliland*, 312 U.S. 86, 95): "The matter of penalties lay within the discretion of Congress. Section [1001] covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences according to the circumstances and gravity of particular violations."

(a) Petitioners repeatedly (Pet. 16, 17, 18) urge that their conviction cannot stand because their false statements did not succeed in perverting the functioning of a government office. But it is settled that the existence of an offense under 18 U.S.C. 1001 does not depend upon the false statement's having succeeded in its fraudulent purpose. *United States* v. *Gilliland*, 312 U.S. 86, 93; *Butzman* v. *United States*, 205 F. 2d 343 (C.A. 6), certiorari denied, 346 U.S. 828; *De Rosier* v. *United States*, 218 F. 2d 420, 423 (C.A. 5); *United States* v. *Apex Distributing Co.*, 148 F. Supp. 365, 371 (D.R.I.); *United States* v. *Quirk*, 167 F. Supp. 462, 464 (E.D. Pa.), affirmed per curiam, 266 F. 2d 26 (C.A. 3). Moreover, petitioners' conduct here (see pp. 5–10, *supra*) was plainly *calculated* to pervert the functioning of the Internal Revenue Service—*i.e.*, deceptively to induce misdirected administrative action by persuading the Treasury agents that the investigations against both petitioners and their corporation should be wound up without criminal or civil sanctions, and with as small a tax deficiency assessment as possible. The fact that the effort failed is of no consequence so far as 18 U.S.C. 1001 is concerned.

(b) Equally without merit is petitioners' broad argument (Pet. 17–20) that the statute was not intended to apply to any false statements made to criminal investigators.[7] The statute contains no such

[7] It should be recalled (see note 2, p. 4, *supra*) that the false statements here were made not only to the special agent but also to the Internal Revenue agent who was present and who was in charge of the civil aspects of petitioners' tax cases. See *Knowles* v. *United States*, 224 F. 2d 168 (C.A. 10).

limitation, and the appellate cases are to the contrary. *Brandow* v. *United States*, 268 F. 2d 559 (C.A. 9); *United States* v. *Silver*, 235 F. 2d 375, 377 (C.A. 2); *Cooper* v. *United States*, 282 F. 2d 527, 530 (C.A. 9); *Cohen* v. *United States*, 201 F. 2d 386, 392 (C.A. 9), certiorari denied, 345 U.S. 951.[10] This Court has said that 18 U.S.C. 1001 should be construed "according to its literal and natural import" (*United States* v. *Gilliland*, 312 U.S. 86, 90–91) and that Congress had made clear its purpose (312 U.S. at 93)

> to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described. We see no reason why this apparent intention should be frustrated by construction.

See also *United States* v. *Bramblett*, 348 U.S. 503, 509–510. We submit that to construe 18 U.S.C. 1001 as not applying to duly authorized representatives of government departments conducting investigations upon substantive matters within the jurisdiction of the same departments, because a criminal prosecution was foreseeable, would plainly frustrate the intention

[10] Petitioners rely (Pet. 18–19) on three district court cases—two of them from the Second Circuit and only one of which, *United States* v. *Philippe*, 173 F. Supp. 582 (S.D.N.Y.), involved a Treasury special agent. The rationale of *Philippe* was that false statements to a special agent "are hardly calculated to, and cannot possibly pervert the authorized functions of a Special Agent" (173 F. Supp. at 584). As we have shown (see p. 18, *supra*), this is an erroneous assumption, and the Second Circuit in the case at bar expressly overruled the *Philippe* case (Pet. 13a).

of Congress to protect the authorized functions of the government.[11]

(c) The third part of petitioners' argument that Section 1001 does not apply to their case is that it was intended to cover only written statements (Pet. 20–25). The argument is without foundation. The language of the statute is clear and comprehensive;[12] as this Court pointed out in *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 46, "no distinction is made in [Section 1001] between written and oral statements," and the courts of appeals have uniformly held that the statute does apply to oral statements. *United States* v. *Meyer*, 140 F. 2d 652, 655 (C.A. 2); *United States* v. *Zavala*, 139 F. 2d 830 (C.A. 2); *Marzani* v. *United States*, 168 F. 2d 133 (C.A.D.C.), affirmed by equally divided Court, 335 U.S. 895; *Knowles* v. *United States*, 224 F. 2d 168 (C.A. 10); cf. *Smith* v. *United States*, 257 F. 2d 133 (C.A. 10); *Cooper* v. *United States*, 282 F. 2d 527 (C.A. 9). Petitioners recite at length the legislative history of a bill that never became law (Pet. 20–24), but all they are able

[11] Petitioners express the "hope" (Pet. 18) that "[w]e have * * * come too far along the road in the development of our national traditions to entertain any notion that a citizen owes an allegiance of fidelity to an individual Government criminal investigator". We suggest that, on the contrary, it is a mark of the high development of our national traditions that we recognize the citizen's "allegiance of fidelity" to his government, whether he deals with that government through "an individual Government" administrator, "an individual Government" judge or "an individual Government criminal investigator."

[12] It is noteworthy that the statute deals with both "false, fictitious or fraudulent statements or representations" *and* "any false writing or document," indicating a clear intention to comprehend something broader than mere writings or documents.

to say (and, indeed, all that can be said in support of their position) about the bill that produced Section 1001 in its present form is that "there is not a solitary suggestion" in the legislative background that the statute was to apply to oral statements (Pet. 25). As was said about a comparable attack on this statute shortly after it was enacted, "such uncertain and at best negative evidence of legislative purpose cannot serve to limit the clear statement of the new statute." *United States* v. *Goldsmith*, 108 F. 2d 917, 919 (C.A. 2), certiorari denied, 309 U.S. 678; cf. *Brouder* v. *United States*, 312 U.S. 335, 338.

4. The contention (Pet. 25–27) that the government committed reversible error in failing to have certain grand jury testimony recorded is without

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[1] Petitioners also suggest (Pet. 17) that the "two witness" rule applicable to perjury prosecutions should have been satisfied in the present case and was not. This was argued for the first time in the court below, no such point having been raised in the district court. In *Weiler* v. *United States*, 323 U.S. 606, relied upon by petitioners (Pet. 17), a perjury conviction was reversed for the trial court's failure to give a requested instruction relating to the "two-witness" rule. In the case at bar the petitioners not only failed to request such an instruction but requested inconsistent instructions, under which verdicts of guilt could be based on circumstantial evidence (C.A. 367, 368, 630–631). Moreover, the "two witness" rule does not apply to prosecutions under Section 1001. *United States* v. *Killian*, 246 F. 2d 77, 82 (C.A. 7); *Fisher* v. *United States*, 254 F. 2d 302 (C.A. 9), certiorari denied, 358 U.S. 895; *Todorow* v. *United States*, 173 F. 2d 439 (C.A. 9), certiorari denied, 337 U.S. 925; *Travis* v. *United States*, 269 F. 2d 928 (C.A. 10), reversed on other grounds, 364 U.S. 631. Finally, the proof in the instant case was so strong that the "two witness" rule was satisfied (see pp. 5–10, *supra*; compare *Hammer* v. *United States*, 271 U.S. 620, 627; *United States* v. *Wood*, 14 Pet. 430, 443).

merit. It is true, of course, that there are occasions when a trial court may in its discretion order grand jury testimony produced for a defendant's use in the cross-examination of government witnesses, *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400, but there is no rule that we are aware of requiring the recording of such testimony. Petitioners' main complaint is that the testimony of the special agent was not recorded. However, there was no need to record such testimony, for at both trials the government turned over to the court a large number of reports and memoranda prepared by the agent, after which a large part of this material (including some of the exhibits to the reports) was turned over to the defense for use in cross-examining the agent (G.A. 61, 443–445). These reports and memoranda adequately took the place of a transcript of the agent's testimony, for there obviously would be no reason for him to give testimony before the grand jury in conflict with his prior reports and memoranda and his later testimony at the trial.

5. Equally lacking in merit is the contention (Pet. 28–30) that the Treasury agent's questions to petitioner McCue, Sr., were too vague. The argument is that when he answered, "Not a thing," to the question, "You didn't have a thing to do with it?" (see pp. 8–9, *supra*), all he meant was that he did not personally negotiate with the well-drilling firm to have the well drilled. The point was raised at the trial, and the jury was instructed in minute detail

as to what it would have to find in order to convict.[6] This submission was proper, for the jury had to consider the context in which the question was asked. *Conrad v. United States*, 255 F. 2d 247 (C.A. 5); *Seymour v. United States*, 77 F. 2d 577, 584 (C.A. 8); *Young v. United States*, 214 F. 2d 232 (C.A. D.C.).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] "To summarize: In order to convict on this third count of the indictment, you must find the pronoun 'it' in the question refers to having the work done; that the defendant fully understood that the word 'it', as used by the questioner, referred to having the work done; that the defendant in his answer did not intend to indicate only that he had nothing to do with the negotiations for or the actual performance of the well drilling and reconditioning services, and that the defendant did intend falsely to say that he had not told Dowzey to have well drilling and reconditioning services performed on McCue, Sr.'s, private estate" (P.A. 533a).

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